No. 88-23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LAURO LINES s.r.l.,

Petitioner,

—v.—

SOPHIE CHASSER, ANNA SCHNEIDER, ILSA KLINGHOFFER and LISA KLINGHOFFER, as Co-Executrixes of the Estate of LEON and MARILYN KLINGHOFFER, VIOLA MESKIN, SEYMOUR MESKIN, SYLVIA SHERMAN, PAUL WELTMAN, EVELYN WELTMAN, DONALD E. SAIRE and ANNA G. SAIRE, CHANDRIS CRUISE LINES, ABC TOURS TRAVEL CLUB, CHANDRIS (ITALY) INC., PORT OF GENOA, ITALY, CLUB ABC TOURS, INC., and CROWN TRAVEL SERVICE, INC., d/b/a RONA TRAVEL and/or CLUB ABC TOURS, and CLUB ABC TOURS, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITION FOR CERTIORARI FILED JULY 6, 1988
CERTIORARI GRANTED OCTOBER 11, 1988

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT IN REPLY

INTRODUCTION

Petitioner's and Respondents' briefs ("PB" and "RB," respectively) indicate agreement on the applicable legal principles and authorities. They also indicate there is no substantial dispute that the order below satisfies two of the three prongs of the test for determining whether an order is appealable prior to judgment. Disagreement centers on the test's third prong, i.e., whether a district court's order denying enforcement of a Forum Clause can be "effectively reviewed" on appeal.

Petitioner submits that such an order cannot be effectively reviewed on appeal, and the United States Courts of Appeal for the

Third, Fourth and Eighth Circuits agree.[1] See PB at 32 and 36-39. By contrast, only the Second Circuit below agrees with Respondents[2]. The decisions from the Fifth

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[1] Hodes v. S.N.C. Achille Lauro, 858 F.2d 905 (3rd Cir. 1988), petition for cert. filed (U.S. Dec. 21, 1988) (No. 88-1036); In re Diaz Contracting, Inc., 817 F.2d 1047, 1048 (3rd Cir. 1987); General Engineering Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352, 355-56 (3rd Cir. 1986); Coastal Steel v. Tilghman Wheelabrator, Ltd., 709 F.2d 190, 195-97 (3rd Cir. 1983), cert. denied 464 U.S. 938 (1983); Sterling Forest Associates, Ltd. v. Barnett-Range Corp., 840 F.2d 249, 253 (4th Cir. 1988); Farmland Industries, Inc. v. Frazier-Parrott Commodities, Inc., 806 F.2d 848, 850-51 (8th Cir. 1986).

[2] Chasser v. Achille Lauro Lines, 844 F.2d 50 (2d Cir. 1988).

and Seventh Circuits are equivocal.[3] See PB at 33-36.

Moreover, there is a strong federal policy, especially in maritime cases, favoring enforcement of forum selection clauses. A finding of immediate appellate review furthers this policy; a finding denying immediate appellate review undermines the policy, and, as a practical matter, leaves enforcement to the discretion of the district courts.

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[3] Louisiana Ice Cream Distributors, Inc. v. Carvel Corp., 821 F.2d 1031 (5th Cir. 1987); Rohrer, Hibler & Replogle, Inc. v. Perkins, 728 F.2d 860 (7th Cir. 1984), cert. denied, 469 U.S. 890 (1984).

I. REPLYING TO RESPONDENTS' POINTS I AND III, AN ORDER DENYING ENFORCEMENT OF A FOREIGN FORUM SELECTION CLAUSE IS EFFECTIVELY UNREVIEWABLE ON APPEAL.

The test for determining whether an order which does not end the litigation is immediately appealable is three-pronged. Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978). First, the order must conclusively determine the disputed question; second, it must resolve an important issue completely separate from the merits of the action; and third, it must be "effectively unreviewable on appeal from a final judgment." Coopers & Lybrand, supra, at 468.

The first and second prong of the test for immediate appellate review are "met easily" by orders refusing enforcement of

forum selection clauses. Sterling Forest Associates v. Barnett Range Corp., 840 F.2d 249, 253 (4th Cir. 1988). Implicitly conceding this, Respondents focus on the third prong by contending: "The right to secure adjudication in a particular forum, which is the goal of a forum selection clause, is not lost simply because enforcement is postponed." RB at 11. This contention was adopted below by the United States Court of Appeals for the Second Circuit: "[T]he right to secure adjudication in a particular forum is not lost simply because enforcement is postponed." Chasser v. Achille Lauro Lines, 844 F.2d 50, 52 (2d. Cir. 1988).

However, the very purpose of a forum clause is not simply to ensure a trial at the selected forum before the chosen tribunal. It is to ensure a single trial in one forum to the exclusion of all others. PB at 30, 38. The efficacy of forum clauses in commercial agreements of all sorts, especially those involving international trade and commerce, is dependent upon prompt, reliable enforcement. A trial outside the agreed forum, followed by an appeal and yet another trial - this time before the proper tribunal - is not what a forum clause contemplates. See Hodes v. S.N.C. Achille Lauro, 858 F.2d 905, 913 (3d Cir. 1988), petition for cert. filed, (U.S. Dec. 21, 1988) (No. 88-1036). A trial in the wrong

forum will have already been had, and no appeal can rectify that. See Abney v. United States, 431 U.S. 651 (1977); Helstoski v. Meanor, 442 U.S. 500 (1979); see also Mercantile National Bank v. Langdeau, 371 U.S. 555, 558 (1963) (§ 1257 certiorari jurisdiction).

As put by the United States Court of Appeals for the Eighth Circuit:

> From a practical viewpoint the district court's order denying application of the clause will be unreviewable after final judgment. After final determination is made on the merits it will be too late effectively to review the present order because the contract and right to trial in Illinois will have been lost. Granted, defendants could raise the issue after a final determination on the merits and possibly gain a new trial in Illinois. However, a Missouri trial and appeal is not what was contemplated by the parties when they signed the contract; what was contemplated is single trial resolution of disputes in Illinois. Denying defendants immediate appeal of this issue will effectively deprive them of a contractual right.

Farmland Industries v. Frazier-Parrott Commodities, 806 F.2d 848, 850-51 (8th Cir. 1986).

Despite this Court's decision in The Bremen, 407 U.S. 1 (1972), a reluctance to enforce forum clauses persists. See Sterling Forest Associates v. Barnett-Range Corp., 840 F.2d 249, 252 (4th Cir. 1988) ("We think evidence of a continuing hostility to forum selection clauses is apparent not only in the district court's egregious misinterpretation of the clause at issue herein, but also in

the manner in which the district court's holding was arrived at.").

The order below satisfies the three pronged Coopers & Lybrand test, fits neatly into the "small class" of exceptions to the final judgment rule recognized in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), and the right to immediate appellate review is in keeping with the strong federal policy favoring enforcement of forum selection clauses. The Fourth Circuit put it best. Appellate review may not await a judgment on the merits - "the time to do it is now." 840 F.2d at 253.

II. REPLYING TO RESPONDENTS' POINT II, THE DECISIONS OF THE THIRD, FOURTH, AND EIGHTH CIRCUITS ARE MORE PERSUASIVE THAN THE DECISION BELOW.

The decisions of the Fifth and Seventh Circuits in Louisiana Ice Cream, supra, and Rohrer, Hibler, supra, relied on by Respondents (RB at 8), involved domestic forum clauses. In Rohrer, Hibler, where the issue was whether the case would be tried in the United States District Court for the Northern District of Illinois or the Circuit Court of Cook County, the Court indicated an order refusing enforcement of a foreign forum clause would qualify for immediate appellate review. Rohrer, Hibler, 728 F.2d at 864. In Louisiana Ice Cream the question of forum clause enforcement was "inextricably

intertwined with the merits." 821 F.2d at 1033.

By contrast, the decisions of the Courts of Appeal relied on by Petitioner squarely find that orders denying enforcement of forum clauses are the proper subject of an immediate appeal. See supra, at n.1. The Hodes decision from the Third Circuit is based on the same cruise, ticket, and forum clause as here.

Respondents' criticism of Coastal Steel, supra (RB at 8-10), is based upon the Third Circuit's discussion of 28 U.S.C. § 2105. However, that discussion demonstrates the difficulty parties aggrieved by District Court orders refusing enforcement of forum clauses will experience in obtaining

effective appellate review after judgment. In any event, consideration of § 2105 is not necessary to a holding that orders denying enforcement of forum selection clauses are immediately appealable as collaterally final orders under Cohen. E.g., Farmland Industries, supra, and Sterling Forest Associates, supra.

CONCLUSION

The Order of the United States Court of Appeals for the Second Circuit dismissing for want of appellate jurisdiction the appeal of Lauro Lines from an Order of the United States District Court for the Southern District of New York denying enforcement of a foreign forum selection clause should be

reversed. The matter should be remanded to the United States Court of Appeals for the Second Circuit for determination of Petitioner's appeal.

Dated: February 23, 1989

Respectfully submitted,

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